United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

74-2466

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IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 74-2466

JOSE BORRELLO,

Plaintiff-Appellee,

—against—

PERERA COMPANY, INC.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT

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TABLE OF CONTENTS

PAGE

Table of Authorities

Cases Cited:

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Statement of Issue

Whether the failure of plaintiff to notify defendant that the latter had misapplied plaintiff's funds after plaintiff had documentary notice of a probable misapplication and while the funds remained under defendant's control supports invoking the doctrine of equitable estoppel and dismissal of the complaint.

Preliminary Statement

This is an appeal by the defendant, Perera Company, Inc., from a judgment, 117a,* entered on October 4, 1974 in the United States District Court for the Southern District of New York (Richard H. Levet, D.J.) in which plaintiff was awarded a recovery of $23,629.57 against defendant.

The case was tried before Judge Levet sitting without a jury on June 14, 1974 and Judge Levet's opinion, findings of fact and conclusions of law, 103a, are dated September 20, 1974 and were filed on September 24, 1974.

Notice of appeal was filed November 4, 1974.

Statement of the Case

This action was commenced on December 21, 1972 to recover the sum of $20,000.00 from the defendant, grounded on a misapplication by the defendant of the plaintiff's funds. Although it is alleged in paragraph 8 of the complaint, 4a, that defendant applied the funds of the plaintiff to cover an overdraft by defendant's customer, Marfinco, S.A., this claim was conclusively refuted by the statement of account between defendant and said Marfinco, 98a, and the allegation was abandoned.

Counsel stipulated and the Court found that diversity jurisdiction exists and that New York law governs, 104a, 114a.

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* References followed by the letter "a" are to the appendix to appellant's brief.

Statement of Facts

Plaintiff, a resident of Argentina, 3a, filed this action against defendant, a corporation organized under the Stock Corporation Law of the State of New York, now the Business Corporation Law, with its principal office located at 29 Broadway in Manhattan, 14a. Defendant provides foreign currency and exchange services, deals in gold coins and issues travellers checks in its own name, 24a-25a.

Prior to the transaction on which this suit is based, plaintiff and defendant had not dealt with each other or heard of each other, direct interrogatory 20, 62a.

Plaintiff did not appear in New York for the trial. His testimony consisted of answers to written interrogatories which plaintiff answered before the United States Consul in Buenos Aires, Argentina, 59a-78a.

On September 20, 1971 plaintiff visited his stockbroker, Waroquiers, S.A., in Buenos Aires, Argentina for the purpose of purchasing $20,000.00 worth of Argentine external bonds. The plaintiff brought with him two $10,000.00 checks drawn on his account at First National City Bank in New York with the name of the payee left blank and plaintiff intended to make each check payable to New York City banks so as to assure himself that the bonds would be delivered to him before the banks parted with the money, cross-interrogatories 7-13, 71a, see also 61a. The stockbroker had no relationship with defendant although the broker's affiliate, Marfinco, S.A., a foreign exchange house located in Montevideo, Uruguay was a customer of defendant and maintained an account with it, 55a.

Defendant's relationship with its customer, Marfinco, S.A., dates from June, 1971 when defendant's Vice President, Mr. von Mihaly, on a visit to South America opened the account for the Waroquiers affiliate, Marfinco, S.A., of Montevideo, Uruguay, 54a, 55a. As will be observed from the Condition Sheet, exhibit B, 102a, six officials of Marfinco, starting with Mr. Mauricio Waroquiers, were designated "Authorized Signatures" having the power, signing singly, to give instructions regarding the account, 102a.

The broker, Waroquiers, induced plaintiff to make his checks payable to defendant, which plaintiff did, direct interrogatory 24, 63a. Simultaneously therewith, a letter of instructions from plaintiff to his broker was delivered to the broker, direct interrogatories 30-31, 64a. In tranlation, the letter, exhibit 5A, 84a, reads as follows:

"September 20, 1971

Waroquiers, S.A.
Florida 656
B. Aires

Dear Sirs:

As we agreed in our conversation, I am sending you two checks Nos. 72 and 73 on the First National City Bank of New York, totaling $20,000, to be used for the buying of Argentine foreign Bonds 1971, to be delivered to a New York bank.

According to your request, these checks will be deposited with Perera Company, Inc. of New York in whose name they are drawn, as a guarantee of the availability of funds, so that you can receive the amount of the bonds upon delivering them to Perera

Company, Inc. with a letter of mine addressed to them authorizing the payment.

When you send the two checks to Perera Company you should send them together with the necessary instructions for carrying out what we have discussed.

Without any more for the moment,

Sincerely,

Jose Borrello:"

The plaintiff does not suggest that a copy of the letter was sent to the defendant, or that he gave any notice to the defendant of any kind. The broker, Waroquiers, and its affiliate, Marfinco, were then in the process of preparing for flight with the funds of their respective customers and they gave no notice to defendant of the underlying trust, bailment and brokerage transaction described in the aforesaid letter. The directions contained in the September 20 letter were violated in that Waroquiers concealed the transaction from defendant and Waroquiers' affiliate sent the checks to New York.

On September 23, 1971 defendant received from its customer, Marfinco, S.A., in Uruguay, a letter transmitting more than a dozen checks (including plaintiff's two checks) totalling $33,481.99, containing the request that the checks be credited to the Marfinco account, exhibit 14, 96a-97a. The request contained in the letter, insofar as plaintiff is concerned, was re-stated in a legend typewritten on the reverse side of each of the plaintiff's checks which read as follows:

"For deposit only—Pay to the credit of Marfinco S.A.", exhibits 3 and 4, 79a-81a.

An abstract of the Marfinco account with defendant, 98a-99a, was prepared by counsel pursuant to stipulation, which omits from the voluminous ledger pages irrelevant entries. As the abstract indicates, Marfinco had a credit balance with defendant of $232,000.00 just prior to the mailing of plaintiff's checks and their receipt in New York. Marfinco continued to have substantial five and six-figure balances with defendant for the ensuing four months, 98a.

Apparently as a part of a scheme already matured between Waroquiers and Marfinco, Waroquiers did not consummate the purchase of Argentine bonds for the plaintiff and, as plaintiff testified, the broker continued to counsel delay, cross-interrogatories 10-13, 71a.

Plaintiff testified that he received his bank statement, exhibit 13, 94a-95a, from First National City Bank in October, 1971, direct interrogatory 45, 66a, that there were only two entries on the statement and that only the two cancelled checks payable to the order of defendant were returned to him with the statement. He testified categorically that when he received the statement and cancelled checks, he looked at the endorsements on the reverse side of the checks, direct interrogatory 49, 67a and cross-interrogatory 50, 76a. At that time, Marfinco had a credit balance with defendant of $185,000.00, see entry for November 1, 1971 on exhibit 15, 98a.

Although plaintiff admittedly saw from the reverse side of the checks that his funds had been credited to Marfinco, S.A., a company of which plaintiff had never heard, direct interrogatory 44, 66a, he took no action to inquire of defendant as to the safety of his funds. In fact, his first com-

munication to defendant was a letter dated March 30, 1972, exhibit 6A, 85a, five months after the plaintiff received his cancelled checks and bank statement.

Three and one-half months after receiving his bank statement with the cancelled checks and in mid-February, 1972, plaintiff learned from the newspaper that his broker, Waroquiers, had absconded with customers' funds and was wanted by the police, direct interrogatories 29 and 30, 73a-74a. Defendant learned of it a day or two later when it received a newspaper clipping from Buenos Aires, 43a. At that time there remained in the account $6,982.43, which the defendant immediately blocked and transferred to a suspense account, 99a. Plaintiff did nothing.

Two weeks after news of his broker's difficulty was reported by the press, plaintiff consulted counsel in Buenos Aires, cross-interrogatories 39 and 40, 75a, but he delayed for another month before addressing a letter to defendant, cross-interrogatory 41, 75a, exhibit 6A, 85a.

On March 24, 1972 defendant was telephoned by an official of Marfinco who requested a check for the credit balance of $6,982.43. On that day, the existence of an adverse claim was unknown to defendant, which consulted counsel, was advised that it had no reason not to pay out the balance of the account to its owner and which it did, 43a-44a, cancelled check 100a-101a.

Six days later and on March 30, 1972, plaintiff, for the first time, bestirred himself and addressed a letter to defendant, which arrived in April, 95a.

ARGUMENT

POINT I

Under settled principles of equitable estoppel, the complaint should be dismissed.

Defendant conceded in the District Court and concedes here its responsibility for a misapplication of the plaintiff's funds on September 23, 1971. It stated in its trial brief and repeats here that if there were nothing more to the case, the claim would have been paid. Defendant resists this claim in reliance on the principles of equitable estoppel as set forth in *Bunge Corp.* v. *Manufacturers Hanover Trust Co.*, 1972, 31 N.Y.2d 223 and on the doctrine of proximate cause.

A. The Negligence of the Plaintiff Is the Proximate Cause of the Loss.

Plaintiff testified that he was retired, that he had been in the export-import business, the manager of a company bearing his name and that he "took care of dealings with the banks, sale and purchase of goods and in general of the whole business operation," direct interrogatories 6 and 7, 60a. It is against this business background that his conduct is to be measured. At the end of October, 1971 he received a bank statement accompanied by two items, the checks he had issued to the defendant. He looked at the backs of the checks and found on both the typewritten legend:

"For deposit only—Pay to the credit of Marfinco S.A."

In answer to direct interrogatory 49, 67a, plaintiff testified that the legends were not on the checks when he delivered

them to his broker. He also testified that he never heard of Marfinco, S.A. and that his broker was stalling him in consummating the bond purchase. Taking these facts together and judged by the plaintiff's admitted background in business and in dealing with banks, his failure to reach for the telephone, or to fire off a cable, or to send the defendant an airmail letter inquiring why the plaintiff's money was paid to the credit of Marfinco, S.A., is fatal to the claim. It is the plaintiff who is the author of his loss or, stated in terms of the law of negligence, it is the plaintiff who had the last clear chance to prevent the loss and whose failure to act was the proximate cause of the loss.

After reading the legends on the backs of the checks in October, 1971, the measure of plaintiff's duty under New York law was stated by Chief Judge Cardozo in this way:

> "Even then, the orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty." *Palsgraf* v. *Long Island R. Co.,* 248 N.Y. 339, 343.

Plaintiff argued in the District Court that the endorsements on the reverse side of the checks are confusing, and in effect, would have been meaningless to plaintiff, who had never heard of Marfinco, S.A. Examination of the checks, 79a-81a, disposes of the contention. The typewritten legend could hardly be clearer. The physical appearance of the checks negates the contention.

Testimony by the plaintiff also conflicts with the position asserted on his behalf. Direct interrogatory 25, 73a and the answer thereto read as follows:

> "25. When did you first hear of the firm Marfinco, S.A.?
>
> "When I looked at the back of the checks."

In view of this categorical admission, it is idle to suggest that plaintiff was not put on notice after looking at the endorsements on the check that his funds had been paid "to the credit" of a firm of which he had never heard.

Although the District Court concluded that defendant's original misapplication of the funds was the proximate cause of the loss, it is undisputed that defendant was in position to make the plaintiff whole throughout the four months which followed the misapplication. The proximate cause of the loss was the plaintiff's failure to react when he received his cancelled checks. That failure, in natural and continuous sequence, unbroken by any new cause, produced the loss and without that failure by the plaintiff, the loss would not have occurred. *Hoggard* v. *Otis Elevator Co.*, 52 Misc. 2d 704, 276 N.Y.S.2d 681, aff'd 28 A.D.2d 1207, 285 N.Y.S.2d 262. Negligence is not found in a vacuum—negligence is without legal consequence unless it is a proximate cause of damage to a blameless person, *In re McCafferty's Will,* 147 Misc. 179, 264 N.Y.S. 38. "The proximate cause is that which is nearest in the order of responsible causation," Bouvier's Law Dictionary.

In *Fidelity & Casualty Co. of New York* v. *Hellenic Bank Trust Co.,* 181 Misc. 40, 45 N.Y.S.2d 43, aff'd mem., 181 Misc. 44, 47 N.Y.S.2d 295, upon which plaintiff relied, the Court found that "There was no relationship, contractual or otherwise, between Emmens' employer and the defendant bank; the former owed no indebtedness of any kind to the latter." In the case at Bar, while there was no relationship between plaintiff and defendant, it is clear from the plaintiff's testimony and from the letter which he delivered to his broker, page 4, *supra,* that a relationship was certainly intended. Minimally, plaintiff intended that

defendant should be the trustee of the funds, the bailee of the Argentine bonds when purchased and the disbursing agent when the bonds had been received and delivered to plaintiff. None of these things came to pass because the plaintiff was imposed upon by his agent, the stockbroker Waroquiers. Notwithstanding the clear instruction in the penultimate paragraph of the letter to the broker that the broker advise defendant of the underlying bond transaction and the terms of the trust, the broker defrauded his client by remaining mute. The dishonesty of the broker is imputable to the plaintiff, *Bunge Corp.* v. *Manufacturers Hanover Trust Co.*, 31 N.Y.2d 223.

Plaintiff urged that defendant should have made inquiry before acting on the instructions of its customer, Marfinco, or obeying the legend on the reverse side of both checks. Plaintiff's home address does not appear on the face of the checks. Defendant received the checks from its customer in Uruguay and was indisputably without knowledge that plaintiff lived in Argentina. In view of the fact that defendant's customer, Marfinco, was in the process of preparing to flee with the funds of its customers, an inquiry to Marfinco would have been a futility. Admittedly, defendant might have made inquiries of the drawee, First National City Bank, but whether the bank would have been willing to make disclosure as to the address of a foreign customer must be left to conjecture since there was no evidence produced at the trial on this point. The implicit but unspoken assumption underlying the making of the argument by plaintiff is that he owed no duties to anyone. This is not the law, *Palsgraf* v. *Long Island R. Co.*, 248 N.Y. 343. Citing Cooley on Torts, *Bouvier* defines negligence as "The failure to observe, for the protection of the inter-

ests of another person, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury."

The general rule is that when one of two innocent parties must bear a loss, the loss must fall on the one who caused it, *National Safe Deposit and Trust Co.* v. *Hibbs,* 229 U.S. 391, 33 S. Ct. 818, 57 L. Ed. 1241.

B. *Plaintiff's Funds, Although Misapplied, Remained Under Defendant's Control for Six Months Thereafter—the Misapplication Was Not the Proximate Cause of the Loss.*

The abstract 98a-99a, of defendant's ledger pages of its account with Marfinco establishes conclusively that defendant's misapplication of plaintiff's funds on September 23, 1971 caused no loss. It shows that on that day, Marfinco had a credit balance of more than $268,000.00. When the plaintiff had in his hands and examined his bank statement and cancelled checks on November 1, 1971, Marfinco's credit balance was $185,549.32. Defendant remained in position to make the plaintiff whole as late as January 24, 1972 when the credit balance was $116,242.44. Marfinco funds subject to defendant's control remained with defendant as late as March 24, 1972 when defendant issued its check for $6,982.43 to close the account at the customer's request, so that damages could have been mitigated even then if plaintiff had reacted to the mid-February press report that his broker was wanted by the authorities for embezzlement of customers' money.

Conceding the original misapplication of funds and assuming that defendant paid out under a mistake of fact,

it is clear that defendant changed position innocently after plaintiff had closed his eyes to unmistakable indicia that his bond purchase transaction was in difficulty.

> "It is now settled, both in England and in this State, that money paid under a mistake of fact may be recovered back, however negligent the party paying may have been in making the mistake, unless the payment has caused such a change in the position of the other party that it would be unjust to require him to refund." *National Bank of Commerce in New York* v. *National Mechanics' Banking Association of New York,* 55 N.Y. 211.

The District Court found that:

> "the defense of alleged failure to inspect the checks returned from the bank is no defense to this defendant. This principle applies only between depositors and the banks." 112a.

Defendant did not allege "failure to inspect." The plaintiff admitted categorically that he did inspect. It is the failure of plaintiff to act after inspection on which the defense of equitable estoppel is based. *National Bank of Commerce in New York* v. *National Mechanics' Banking Association of New York,* 55 N.Y. 211, *Palsgraf* v. *Long Island R. Co.,* 248 N.Y. 339, *Hoggard* v. *Otis Elevator Co.,* 52 Misc.2d 704, 276 N.Y.S.2d 681, aff'd 28 A.D.2d 1207, 285 N.Y.S.2d 262, *In re McCafferty's Will,* 147 Misc. 179, 264 N.Y.S. 38.

The applicable principle is stated in *Bunge Corp.* v. *Manufacturers Hanover Trust Co.,* 31 N.Y.2d 223, decided on July 6, 1972, a case arising from the salad oil scandal

in which, under the doctrine of equitable estoppel, the Court of Appeals directed dismissal of the complaint.

> "The dispositive issue, however, in our opinion, is whether under the doctrine of equitable estoppel, Bunge should be estopped from maintaining this action against Manufacturers. Essentially, the nub of this issue is whether Bunge should be barred on the basis that its employee was the chief culprit in switching the checks. The trial court viewed this as merely another attempt to raise the defense of negligence and summarily dismissed it. The Appellate Division, two Justices dissenting, dismissed the complaint and held that the doctrine of equitable estoppel was applicable to the circumstances presented in the instant case.
>
> "The order of the Appellate Division is affirmed and the complaint dismissed.
>
> "The primary ground for dismissing the complaint is the application of the doctrine of equitable estoppel. Simply stated, the doctrine is 'that where one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it.' (National Safe Deposit Savings & Trust Co. v. Hibbs, 229 U.S. 391, 394, 33 S. Ct. 818, 819, 57 L. Ed. 1241.)" Page 228.

Here, the "chief culprit" is plaintiff's agent, Waroquiers, which violated the terms of the September 20 letter, page 4, *supra*. *Bunge* is discussed in *Brady* on Bank Checks, 1974 Supplement in which it is stated:

> "The court denied recovery by the payee of the cashier's checks against the issuing bank, on the ground that the

> payee was 'equitably estopped' through the fraudulent conduct of its own employee to whom the cashier's checks had been entrusted."

Here the fraudulent conduct of plaintiff's broker justifies the same estoppel.

Plaintiff relies upon the statement of the Appellate Division, Fourth Department in *Federal Insurance Co.* v. *Groveland State Bank,* 44 A.D.2d 182, 354 N.Y.S.2d 220, 228 that:

> "Defendant's reliance on the doctrine of equitable estoppel as stated in Bunge Corporation v. Manufacturers Hanover Trust Company, 31 N.Y.2d 223, 335 N.Y.S. 2d 412, 286 N.E.2d 903—'* * * where one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss, must sustain it' (p. 228, 335 N.Y.S.2d p. 415, 286 N.E. 2d p. 905)—is misplaced. By virtue of its misconduct in receiving Lincoln's funds and paying them to Jaquish without inquiry addressed to Lincoln, defendant fails to qualify as an 'innocent' person."

To the extent that there is inconsistency between the decisions in *Groveland* and in *Bunge,* it requires no citation of authority to establish that it is the Court of Appeals of New York which states the law. The estoppel conduct present here is not found in *Groveland,* which was decided on motion for summary judgment. In any event, *Federal Insurance Co.* v. *Groveland State Bank,* 44 A.D.2d 182, 354 N.Y.S.2d 220 has been appealed to the Court of Appeals and is to be argued at the February term.

Both the plaintiff and the defendant have been victimized by the dishonesty of the plaintiff's agent, Waroquiers, S.A. Quoting *National Safe Deposit and Trust Co.* v. *Hibbs,* 229 U.S. 391, 33 S. Ct. 818, 57 L. Ed. 1241, the Court of Appeals stated in *Bunge* that:

> "The principles which underlie equitable estoppel place the loss upon him whose misplaced confidence has made the wrong possible."

See *Wilmerding* v. *Postal Telegraph,* 118 App. Div. 685, 689, 183 N.Y.S. 594, 597, aff'd 192 N.Y. 580, 85 N.E. 1118 and *Matter of National Sur. Co.* [*Benenson*], 162 Misc. 344, in support of the proposition that equitable estoppel is applied in situations where an agent was unfaithful. Plaintiff appeared to urge in the trial court that defendant was imposed upon by its customer, Marfinco, and that the dishonest agent rule should therefore be applied against the defendant, but it is, at best, strained to suggest that defendant's customer was its agent. No authority was cited in support of this proposition.

C. *Crucial Findings by the District Court Are Clearly Erroneous.*

The District Court's finding of fact No. 17 reads as follows:

> "Thus, Perera, after acceding to Marfinco's conversion of the checks to defendant, compounded the theft by itself converting the funds to Perera without regard to plaintiff's rights. Clearly, Marfinco had no right to transfer any interest in the checks (which were payable to Perera) and Perera had no right to credit such funds to Marfinco nor to convert such funds to itself.

> This is a clear-cut case of plain chicanery upon the part of defendant." 107a, 108a.

In no brief filed by plaintiff is there any suggestion of "chicanery" on the part of the defendant and the District Court's finding of chicanery is gratuitous and incomprehensible. Since the facts are largely undisputed, the finding of "chicanery" is an embarrassment to counsel on both sides, as well as to defendant—it suggests a basic misapprehension as to undisputed and largely documentary facts and apparently led the District Court to reject *Bunge Corp.* v. *Manufacturers Hanover Trust Co.,* 31 N.Y.2d 223 and to follow *Federal Insurance Co.* v. *Groveland State Bank,* 44 A.D.2d 182, 354 N.Y.S.2d 220, although the latter is factually distinguishable. The catalogue of absurdities ascribable to plaintiff here was not present in *Groveland.* Judge Levet also found that "defendant's manipulations with respect to the checks were somewhat involved," 111a, although no evidence supports this stricture and in no brief did plaintiff suggest that defendant practiced "manipulations," either involved or otherwise.

The District Court's findings of fact, No. 15, 107a, that defendant made no attempt to inquire as to Marfinco's title to the checks and that this omission forecloses reliance on the principle of equitable estoppel, No. 9, 116a are unsupported by any evidence that inquiry would have been fruitful and ignore the substantial evidence that in view of an ongoing embezzlement, inquiry would have been a futility.

The District Court found, No. 5, 115a, that defendant failed to prove "that plaintiff was negligent or that, even if negligent, any of the plaintiff's acts was the proximate cause of the loss," 115a. The finding is plainly contrary to

the evidence, which consists of plaintiff's admissions and the checks themselves. The finding is clearly erroneous within the meaning of Rule 52, F.R.C.P. and, since the evidence consists of plaintiff's admissions in a deposition and of documents, the District Court was in no better position than is this Court to weigh such evidence. *Orvis* v. *Higgins,* C.A., Second Cir., 180 F.2d 537, certiorari denied, 340 U.S. 810, 71 S. Ct. 37, 95 L. Ed. 595.

Even if it be assumed that *Federal Insurance Co.* v. *Groveland State Bank,* 44 A.D.2d 182, 354 N.Y.S.2d 220 will be affirmed by the New York Court of Appeals, it is distinguishable because the substantial and documented estoppel conduct present here was not found in *Groveland.* On the basis of the holding in *Bunge Corp.* v. *Manufacturers Hanover Trust Co.,* 1972, 31 N.Y.2d 223, it was error to grant judgment in favor of the plaintiff herein.

CONCLUSION

The judgment appealed from should be reversed and the complaint dismissed.

Respectfully submitted,

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